IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

FRIDAY, THE 7TH SEPTEMBER 2007 / 16TH BHADRA 1929

FAO.No. 5 of 2004()

AS.67/1999 of III ADDL.SUB COURT, ERNAKULAM
OS.835/1995 of PRL.MUNSIFF'S COURT,ERNAKULAM

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APPELLANTS/RESPONDENTS/PLAINTIFFS:

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1. BEATRICE MARGARITA DIAZ ALIAS BETTY DIAZ
   W/O. LATE JOSEPH DIAZ, AGED 82,MANNEZHATHUPARAMBU,
   XVII/560, SAUDI, MUNDAMVELI P.O., KOCHI TALUK.

2. FIONA JACOB, D/O. LATE JOSEPH,
   AGED 42, MANNEZHATHUPARAMBU, XVII/560, SAUDI,
   MUNDAMVELI P.O., KOCHI TALUK.

3. BERNA D'SOUZA, D/O. LATE JOSEPH,
   AGED 50, MANNEZHATHUPARAMBU, XVII/560, SAUDI,
   MUNDAMVELI P.O., KOCHI TALUK.

4. ROLLAND DIAZ, S/O. JOSEPH DIAZ,
   AGED 55, C.I. RODHOT APPARTMENTS, ST.REOGUES ROAD,
   BANDRAN, BOMBAY-50.

5. ROSE MARY DIAZ, D/O. JOSEPH DIAZ,
   AGED 52, NO.7 MARRONON CREARENT, BEEACH BORO 6063,
   W.AUSTRALIA.

6. CLAUDIUS DIAZ, S/O. JOSEPH DIAZ,
   AGED 48, NO.7, MARRONON CREARENT, BEEACH BORO 6063
   W. AUSTRALIA.

7. DENNIS D'SOUZA, AGED ABOUT 54,
   S/O. LATE IDA D'SOUZA, PALACKAL HOUSE, SAUDI,
   MUNDAMVELI P.O., KOCHI-682 507.

8. LLOYD D'SOUZA, AGED 55,
   S/O. LATE IDA D'SOUZA, C/O. C.V.JOHN,
   CHIRAPARAMBIL HOUSE, MUNDAMVELI P.O.,
   KOCHI-682 507.

9. DOROTHY D'SOUZA, AGED 53,
   D/O. LATE IDA D'SOUZA, PALAKKAL HOUSE, SOUDI,
   MUNDAMVELI P.O., KOCHI-682 507.
   (APPELLANTS 4,5 AND 6 REPRESENTED BY POWER OF
   ATTORNEY 1ST APPELLANT BEATRICE MARGARITA DIAZ)

BY ADV. SRI.S.SREEKUMAR

RESPONDENTS: APPELLANTS & RESPONDENTS 7 & 8/DEFENDANTS:
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* 1. MARY DIAZ, W/O. LATE STEPHEN DIAZ,
AGED 74, MANNAZHATH HOUSE, SAUDI,
MUNDAMVELI P.O., KOCHI TALUK. (**DIED**)

2. SAMUEL DIAZ, S/O. LATE STEPHEN DIAZ,
AGED 50, MANNAZHATH HOUSE, SAUDI, MUNDAMVELI P.O.

3. JOHN DONALD DIAZ, S/O. LATE STEPHEN DIAZ
AGED 45, MANNAZHATH HOUSE, SAUDI, MUNDAMVELI P.O.,
KOCHI TALUK.

4. JOHN GALDSTONE DIAZ,
S/O. LATE STEPHEN DIAZ, AGED 45, MANNAZHATH HOUSE,
SOUDI, MUNDAMVELI P.O., KOCHI TALUK.

5. RUBY DIAZ, D/O. LATE STEPHEN DIAZ,
AGED 42, MANNAZHATH HOUSE, SAUDI,
MUNDAMVELI P.O., KOCHI TALUK.

* 6. TRESA DIAZ, W/O. JULIAN D'COUTHA,
AGED 70, KAZHUTHUMUTTU, MANNAZHATH HOUSE, SAUDI,
MUNDAMVELI P.O., KOCHI TALUK. (**DIED**)

7. VICTORIA D'COUTHA, W/O. M.A.D'COUTHA,
AGED 70, KAZHUTHUMUTTU, MANNAZHATH HOUSE, SAUDI,
MUKNDAMVELI P.O., KOCHI TALUK.

8. STANLEY D'SOUZA, AGED ABOUT 60,
S/O. LATE IDA D'SOUZA, NO.18, 1ST FLOOR,
4TH CROSS HUTCHINS ROAD, BANGALORE-560005.

9. MERLINE D'SOUZA, D/O. LATE IDA D'SOUZA,
PALAKKAL HOUSE, SAUDI, MUNDAMVELI P.O.,
COCHIN-682 507.

(IT IS RECORDED THAT THE LEGAL REPRESENTATIVES OF THE DECEASED FIRST RESPONDENT ARE ALREADY IN THE PARTY ARRAY AS RESPONDENTS 2 TO 5 AND THE DECEASED 6TH RESPONDENT HAD NO LEGAL REPRESENTATIVES EXCEPT THE APPELLANTS AND THE SURVIVING RESPONDENTS, AS PER ORDER IN MEMO (CF.3957) DT. 30.3.2007.

BY ADV. SRI.R.VENUGOPAL
SRI.K.G.BALASUBRAMANIAN

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 07/09/2007, ALONG WITH FAO NO.6 OF 2004, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

F.A.O.Nos. 5 & 6 of 2004

Dated this the 7th September, 2007.

J U D G M E N T

The appellants in these appeals are the plaintiffs in O.S.No.787 & 835/1997, on the file of the Munsiff's Court, Ernakulam. These two appeals are filed challenging the common judgment passed by the Subordinate Judge's Court, Ernakulam, in A.S.Nos. 67 & 68 of 1999. The above two appeals arose from the common judgment and decrees passed in O.S.Nos. 835 & 787 of 1995. O.S.No.787/1995 was filed for a decree of permanent prohibitory injunction restraining the defendants from trespassing into the suit property, or from interfering with the possession of the plaintiff. O.S.No.835/1995 was filed for partition. O.S.787/1995 was decreed and O.S.No.835/1995 was dismsised on the ground of non-joinder of necessary parties. Challenging the decree and judgment passed in O.S.No.835/1995, A.S.No.67/1999 was filed by defendants 1 to 5, 7 and 8 in that suit. A.S.No.68/1999 was filed by defendants 1 to 5 challenging the decree passed in O.S.No.787/1995. The lower appellate court allowed both appeals, set aside the decrees and judgment passed in both suits and remanded the cases for fresh disposal. Challenging the judgment

passed in A.S.No.67/1999, F.A.O. 5/2004 is filed. F.A.O.6/2004 is filed against the judgment passed in A.S.No.68/1999.

2. F.A.O.No.5/2004:- This appeal arise from O.S.No.835/1995, on the file of the Munsiff's Court, Ernakulam. The suit along with a petition for injunction was filed before the Vacation Court on 25.4.1995. The plaint was transmitted to Munsiff Court, Kochi, and numbered as O.S.No.185/1995. Subsequently, it was transferred to Munsiff's Court, Ernakulam and numbered as O.S.No.835/1995. The appellants filed that suit for partition. It was averred that the suit properties originally belong to late Thomas Diaz. He had two sons, viz., John Diaz and Augustine Diaz. It was averred that after the death of Thomas Diaz, the properties devolved upon his two sons. In the year 1925, they entered into an oral partition, whereby, southern plot of 45 cents was set apart to the share of Augustine Diaz and northern plot comprising of 45 cents to John Diaz. It was contented that Augustine Diaz had a son, viz., Peter Diaz. John Diaz had two sons, Steaphen Diaz and Joseph Diaz. John Diaz had three daughters also. They were, Ida Diaz, Treasa Diaz and Victoria Diaz. Plaintiffs and defendants 9 to 11 are the legal heirs of Joseph Diaz. Augustine Diaz died in 1961, and after his death, his properties

devolved upon Peter Diaz. He was residing with his brother in a building situated in the property. Peter Diaz executed a settlement deed, No.767/1981, dated 6.3.1981, by which 25 cents out of 45 cents and building was settled in favour of Angelina, his wife, and the balance 20 cents in favour of Joseph Diaz, as per the document No.1119 of 1982. Peter Diaz died in the year 1987, and his wife Angelina died in the year 1994. They have no children. So, 25 cents gifted to Angeline devolved upon the children of John Diaz. According to the plaintiffs, they along with defendants 9 to 11 are entitled to get one-fifth share of that 25 cents. It was averred that plaintiffs and defendants are co-owners in joint possession of the suit property. Hence, the suit for partition.

3. Defendants 1 to 5 had filed a joint written statement. It was contented that the suit property was not partiable. The contention that the plaintiffs were co-owners were denied. The contention that there was an oral partition between John Diaz and Augustine Diaz in the year 1925 was denied. It was admitted that Thomas Diaz was the owner of the suit properties. It was contented that the property belonged to the Taravad in that property, where the Taravad house was situated. It was contented that Augustine Diaz

constructed a building, on the southern side of the Taravad building, and that building was occupied by the defendants. It was contented that Late Stephen Diaz, husband of the first defendant and father of defendants 2 to 5, were in possession of that building. It was contented that Augustine Diaz was unmarried till his death, and after his death, his right over the properties devolved upon his only brother John Diaz, and he became the owner of the entire property. It was contented that he put Stephen Diaz in possession of the entire property, who was the predecessor-in-interest of defendants 1 to 5. It was contented that the first sentence in paragraph 2 of the plaint was false. It was also contented that Augustine Diaz was member of the Parish Church of Saude, and he did not marry till his death. It was contented that Marriage Register of the Church will not show that Augustine Diaz was married. John Diaz had two sons and three daughters. It was contented that after the death of Augustine Diaz, his share of 45 cents and house devolved upon his only brother John Diaz, since he was unmarried. It was contented that Peter Diaz filed O.S.No.455/64 before the Munsiff's Court, Kochi, contending that Augustine Diaz was his father. That suit was dismissed and that decision operates as Res judicata. It was contented that if Peter Diaz had created any document with regard to the property, those

documents are null and void ab initio and not binding on defendants 1 to 5. The claim of ownership put forward by the plaintiffs in respect of 20 cents was denied. It was contented that Peter Diaz was married, but he had no issues. But it was contented that Peter Diaz had no title, possession or ownership over 45 cents. The entire properties devolved upon John Diaz, who conveyed the properties to Stephen Diaz, and after his death, his heirs divided the properties and executed partition deed on 28.9.1995. The rights claimed by the plaintiffs were denied. The averment that plaintiffs and defendants 9 to 11 are co-owners was denied. The suit is barred by non-joinder of necessary parties. It was contented that the plaintiffs have filed another suit as O.S.No. 787/1995 before the same Court, in respect of the same property, and that suit was also pending.

4. Defendants 6 to 8 have filed joint written statement raising the following contentions. It was admitted that Late Thomas Diaz was the owner of the property. There was a Taravad house in the property and John Diaz was residing in that building. Augustine Diaz constructed another building and was residing in that building. Augustine Diaz was unmarried. After his death, the entire property devolved upon John Diaz. Augustine Diaz was a member of the

Parish Church of Saude, and he has never married till his death. There was no entry in the Marriage Register of the Church, to the effect that Augustine Diaz was married. Peter Diaz did not get any right, title or ownership over 45 cents of land and house therein, and the document created by him are null and void. They also press for a dismissal of the suit.

5. Subsequently, defendants 1 to 5 have filed an additional written statement, and an alternate plea was taken to the effect that in case the court find that the properties are partiable, share of the defendants may also be allotted to them.

6. F.A.O.No.6/2004:- This appeal arise from the order of remand passed in A.S.No.68/1999, on the file of the Sub Court, Ernakulam. The suit was initially filed as O.S.No. 119/1995 before the Munsiff's Court, Kochi, which was subsequently transferred to Sub Court, Ernakulam, and re-numbered as O.S.No.787/1995. In the plaint, it was averred that the suit properties originally belong to Thomas Diaz. He had two sons, viz., John Diaz and Augustine Diaz. It was contented that in the year 1925, John Diaz and Augustine Diaz orally partitioned the property, whereby the southern 45 cents was set

apart to the share of Augustine Diaz and northern 45 cents to John Diaz. It was contended that Augustine Diaz died in the year 1961 and his rights devolved upon his only son Peter Diaz, who was residing along with his wife Angelina. During his life time, he settled 25 cents of land in favour of his wife Angelina and assigned the remaining 20 cents in favour of John Diaz. It was averred that the plaintiffs are the heirs of John Diaz. It was averred that defendants are trying to trespass into 20 cents. Hence, the suit for decree of permanent prohibitory injunction restraining the defendants from trespassing into the suit property.

7. Defendants filed a joint written statement contending that there is no oral partition as claimed in the plaint. It was admitted that the entire properties originally belong to Thomas Diaz. The fact that he had two sons by name Augustine Diaz and John Diaz was also admitted. There was a house in the property and the same was occupied by John Diaz. Augustine Diaz constructed another building, and that building is now occupied by the defendants. It was contented that Augustine Diaz was not married. His rights devolved upon his brother John Diaz. It was contented that Augustine Diaz was never married and the marriage register of the Church will not show

that Augustine Diaz was married. It was contented that since Augustine Diaz died issueless, his rights devolved upon John Diaz. So, the contention that properties of Augustine Diaz devolved upon Peter Diaz, who in turn assigned 20 cents to John Diaz, the predecessor-in-interest of the plaintiffs were denied. They prayed for dismissal of the suit.

8. The trial court consolidated both the suits. In O.S.No.787/1995, the issue raised was whether the plaintiffs were entitled to the injunction as prayed for, and whether the suit was bad for non-joinder of necessary parties. In O.S.No.835/1995, the issue raised was, whether the plaintiffs were entitled to the partition, if so, what is the share ? and whether the suit was bad for non-joinder of necessary parties.

9. The trial court found that no effective relief could be granted to the plaintiffs in O.S.No.835/1995, since Smt.Winnie Tressa Dias, who was also one of the co-owner was not impleaded in the suit. The trial court found that the claim raised were not hit by the principles of resjudicata. It further found that Peter Diaz was the Son of Augustine Diaz and Maria Diaz, they were married in accordance

with the customary rites and they were living together as man and wife, and Peter Diaz was born in their wed lock. Hence, it was found that appellants are entitled to a decree of permanent prohibitory injunction in O.S.No.787/1995. But in view of the finding that all necessary parties were not impleaded, O.S.No.835/1995 was dismissed. Challenging the decrees and common judgment, defendants 1 to 5 in O.S.No.787/1995 filed A.S.No.68/1999. Defendants 1 to 7 in O.S.No.835/1995 filed A.S.No.67/1999. The appellants in A.S.No.67/1997 filed I.A.No.2073/2001 under Order XLI Rule 27 of Civil Procedure Code for admitting a document. Subsequently, they have filed I.A.No.23/2003 for admitting two more documents as additional evidence.

10. When the appeals came up for hearing, the lower appellate court found that the question as to whether Peter Diaz was the legitimate son or illegitimate son of Augustine Diaz assumes importance and the trial court ought to have summoned the church records to find out the same. Regarding the petition to admit additional evidence, it was found that there was inordinate delay in producing those documents . But, it was further held that those documents are very material and hence those documents cannot be

ignored, merely because there was delay. The learned Subordinate Judge, in fact, considered the evidentiary value of those documents. It was held that photo copy of page No.81 of the marriage register produced would show that Peter Diaz was illegitimate son of Augustine Diaz. It was further held that the basic document in respect of Christian Birth was the Baptism Register mentioned by the Church and that record is highly essential to decide the issue arising for consideration. The lower appellate court set aside the decrees and judgment passed by the court below, and remanded both the suits for fresh consideration. Challenging those remand orders, these first appeal from orders are filed.

11. No questions of law were framed in these appeals, at the time of admission. Subsequently, the learned counsel appearing for the appellants filed I.A.No.1133 and 1134 of 2007, to amend the appeal memorandum, by raising the substantial questions of law. Those petitions were allowed and the following substantial questions of law were framed, at the time of hearing.

> "a) Whether the lower appellate court had exceeded the jurisdiction conferred under Order 41 Rule 23 and 27 of Code of Civil Procedure in remanding the suits to the trial court.

b) Whether the additional documents produced by the respondent before the lower appellate court is a justifiable ground to invoke jurisdiction under Order 41 Rule 23 of Code of Civil Procedure.

c) When the evidence on record is sufficient to render a judgment, whether lower appellate court is justified in remanding the suit."

12. The appeals were heard on the substantial questions of law framed. There are certain proved or admitted facts. The suit properties originally belong to Late Thomas Diaz. He had two sons, John Diaz and Augustine Diaz. The date of death of John Diaz is not clear from the pleadings. He had two sons, viz., Stephen Diaz and Joseph Diaz, and three daughters, viz., Ida Diaz, Treasa Diaz and Victoria Diaz. Stephen Diaz died. Defendants 1 to 8 are his legal heirs. First defendant is the widow of Stephen Diaz and Defendants 2 to 8 are their children. Joseph Diaz also died. The first plaintiff is his widow and plaintiffs 2 and 3 are the children born in that wed lock. The entire properties were having an extent of 90 cents. In the year 1925, there was an oral partition took place between John Diaz and Augustine Diaz. Southern plot having an area of 45 cents was set apart for Augustine Diaz and northern 45 cents was set apart for John Diaz.

13. The case of the plaintiff is that Augustine Diaz was married and son was born to him, by name Peter Diaz. Peter Diaz married Angelina. Peter Diaz died in the year 1987 and Angelina died in the year 1994. Peter Diaz died issueless. According to the plaintiffs, Peter Diaz assigned 20 cents of land to Joseph Dias, who was one of the sons of John Diaz. The remaining property was gifted to his wife, Angelina. After the death of Angelina in the year 1994, the 25 cents of properties gifted to her devolved upon the heirs of John Diaz, who was the only brother of Augustine Diaz. The plaintiffs claimed one-fifth share in the properties inherited from Angelina and claimed absolute right over 20 cents of property assigned to their predecessor-in-interest Joseph Diaz. Trial Court found that Peter Diaz was the son of Augustine Diaz. It also found that assignment deed executed by Peter Diaz in favour of Joseph Diaz was a valid document and decreed the suit for injunction. It also found that the plaintiffs are entitled to one-fifth share inherited from Angelina, but the suit was dismissed on the ground of non-joinder.

14. The plaintiffs did not file any appeal against the decree and judgment passed by the trial court dismissing O.S.No.835/1995. But strangely enough, the defendants in that suit

filed an appeal against the decree dismissing the suit. The lower appellate court did not even bother to consider whether the defendants in a suit which is wholly dismissed in their favour are entitled to file an appeal against the decree passed by the trial court dismissing the suit. The lower appellate court did not even bother to understand the facts correctly. It is not even possible to find out which appeal is filed against the judgment and decree in O.S.No.787/1995 and which appeal is filed against the judgment and decree passed in O.S.No.835/1995.

15. The learned counsel appearing for the appellants, Sri.S.Sreekumar, has argued before me that the lower appellate court did not consider the pleadings in this case. It was contented that the defendants had never raised a contention that Peter Diaz was the son of Augustine Diaz, but since he was an illegitimate son, he was not entitled to succeed to the estate of Augustine Diaz. It is argued that contention raised was that Augustine Diaz died unmarried and a perusal of the records of the Church will show that he was never married. There is no averment as to what was the relationship between Peter Diaz with Augustine Diaz. It is argued that since there

was no dispute regarding the legitimacy of Peter Diaz, the trial court did not raise such an issue. It only considered whether Peter Diaz is the son of Augustine Diaz.

16. The learned counsel appearing for the contesting respondents, who were the appellants, in both the appeals in the court below, has argued that the Court shall not pick out certain words in the written statement also, and read the same in isolation to the other contentions in the written statement. It is argued that sum and substance of the contentions raised by the defendants were that Augustine Diaz was not married, in accordance with the customary rites. If at all he was living with Angelina, she will have the status of a concubine. It is argued that as per the provisions of Christian Law, an illegitimate son is not entitled to succeed the assets of his father. It is argued that parties understood the pleadings, and proceeded with the trial of the suit, as if the main issue arising for consideration was whether Peter Diaz was the legitimate son of Augustine Diaz. It is argued that both sides adduced evidence to substantiate that contention, and in fact, trial court found that Augustine Diaz was married in accordance with the customary rites, and in that wed lock, Peter Diaz was born. It was contented that paternity of Peter Diaz was

not in dispute. What was in dispute was, whether he is the legitimate son of Augustine Diaz, and that question was considered by the trial court.

17. I do not think, it is necessary to consider the rival contentions raised by both sides on its merits in these appeals. As already stated, A.S.No.67/1999 is filed by the defendants in O.S.No.835/1995, against the decree dismissing the suit in their favour. The appellants in that appeal filed I.A.No.2073/2001 and I.A.No.23/2003 to admit fresh documents in that appeal. No petition to admit additional evidence was filed, in the appeal filed against the decree passed by the court below, by which a decree of permanent prohibitory injunction was passed against the appellants. The lower appellate court forget the fact in a civil suit, it is not the duty of the court to collect evidence. It is the duty of the parties to adduce evidence in support of their contentions. The lower appellate court observed that the question whether Peter Diaz was the legitimate or illegitimate, assumes importance and records ought to have been summoned to establish that. No such duty is cast upon the trial court

dealing with the civil suit. The burden of proof is on the party who alleges a positive fact. If he fails to prove that fact, he is not entitled to get any relief.

18. There is yet another fact. As already stated, I.A.No.2073/2001 was filed under Order XLI Rule 27 of Civil Procedure Code, which deals with production of additional evidence in the appellate court, is as follows:-

> **"27. Production of additional evidence in Appellate Court:-** (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary , in the Appellate Court. But if-
>
> (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
>
> {(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise or due diligence, be produced by him at the time when the decree appealed against was passed, or}
>
> (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

> the Appellate Court may allow such evidence or document to be produced or witness to be examined.
>
> (2) Whereever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

19. A reading of the above rule shows that parties to a appeal shall not be entitled to produce additional evidence, whether oral or documentary in the ordinary course, but exceptions are stated in the three sub clauses. Hence, when a party to the appeal files an application to admit additional evidence, the court is bound to consider whether any one of the grounds mentioned in Order XLI Rule 27 of Civil Procedure Code is made out. A perusal of I.A.No.2073/2001 shows that the only order passed in such an application is, 'for counter and hearing, posted to 4.4.2001.' Thereafter, no order is seen passed in that application. In I.A.No.23/2003, which is filed on 4.1.2003, was taken on 16.1.2003 and posted for objection and hearing to 20.1.2003. On 20th of January, 2003, a further order was passed to file objection, and time was granted upto 27.1.2003. Thereafter no orders were passed. The lower appellate court did not consider whether the appellants had established any one of the

grounds stated in Rule 27 of Order XLI of Civil Procedure Code. It did not record any reason also. In fact, it did not pass any order at all. The lower appellate court in Page 29 of its judgment, refers to these interlocutory applications. Without allowing the petition, without admitting the documents produced along with that petition, the lower appellate court considered the evidentiary value of those documents. The lower appellate court without admitting those documents considered the matter on its merits, which is impermissible. The lower appellate court failed to not that whatever be the evidentiary value of a document, however material that it may be, it has no jurisdiction to consider the relevancy of such a document, without admitting that documents in evidence.

20. There is yet another aspect. The lower appellate court directed the trial court to summon the registers without any prayer or request to that effect. So, I have no other option, but to set aside the orders of remand passed by the lower appellate court and remand the two appeals back to the lower appellate court, for fresh consideration, in accordance with law. I make it clear that I am not

expressing any opinion regarding the merits of the rival contentions raised by either side and it is a matter to be considered and decided by the lower appellate court, while re-hearing the matter.

In the result, F.A.O.No.5/2004 and F.A.O.No.6/2004 are allowed. The common judgment passed by the lower appellate court in A.S.Nos. 67 & 68 of 1999, remanding the cases, A.S.Nos.67/1999 & 68/1999, are hereby set aside, and remanded to the lower appellate court for fresh disposal in accordance with law. Parties are directed to suffer their respective costs.

Parties are directed to appear before the Sub Court, Ernakulam, on 15.10.2007.

K.PADMANABHAN NAIR,
JUDGE

nj.

K.PADMANABHAN NAIR, J.

F.A.O.Nos. 5 & 6 of 2004

J U D G M E N T

Dated:7th September, 2007.